83-1390
No. _____

IN THE
Supreme Court of the United States
October Term, 1983

LAVERNE WILLIAM BROWN, JR.,
Petitioner,

v.

ROSAMOND F. BROWN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

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QUESTION PRESENTED

May California declare that Section 1408 of the Uniformed Services Former Spouses Protection Act [Pub.L. 97-252, 10 U.S.C. § 1408] abrogates the decision of the United States Supreme Court in *McCarty v. McCarty* (1981) 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728 and allow Section 1408 of the Uniformed Services Former Spouses Protection Act to apply retroactively to judgments which became final prior to the effective date of that statute (February 1, 1983)?

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Petitioner, LaVerne William Brown, Jr., prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal for the State of California, Fourth Appellate District, Division One, rendered in these proceedings on August 15, 1983, and modified on September 8, 1983.

OPINIONS BELOW

The Interlocutory Judgment of Dissolution of Marriage entered in San Diego County Superior Court Case No. D 36551 is appended as Appendix A. The Findings of Fact and Conclusions of Law made by the trial court in this proceeding, San Diego County Superior Court Case No. D 367326, is appended as Appendix B. The judgment entered in this proceeding on May 5, 1977, is appended as Appendix C. The opinion on appeal of the Court of Appeal of the State of California, Fourth Appellate District, Division One, rendered on February 26, 1979, is appended as Appendix D. The judgment of the trial court on remand, which was filed on May 12, 1982, is appended as Appendix E. The order of the trial court vacating the judgment filed May 12, 1982, is appended as Appendix F. The trial court's Statement of Intended Decision subsequently filed on December 10, 1982, is appended as Appendix G. The judgment filed by the trial court on December 15, 1982, pursuant to said Statement of Intended Decision is appended as Appendix H. The opinion on appeal of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed on August 15, 1983, is appended as Appendix I. The subsequent order of the Court of Appeal of the State of California, Fourth Appellate District, Division One, filed on September 8, 1983, modifying its opinion is appended as Appendix J. The denial of Petitioner's Petition for Rehearing filed by said Court of Appeal on October 7, 1983, is appended as Appendix K. The decision of the Supreme Court of the State of California declining a hearing in that court on November 23, 1983, is appended as Appendix L. A copy of the Uniformed Services Former Spouses Protection Act (Title 10, Pub.L. 97-252), is appended as Appendix M.

JURISDICTION

The order of the Supreme Court of the State of California denying a hearing in this case was entered on November 23, 1983. (See Appendix L.) This petition for a Writ of Certiorari was filed less than ninety (90) days from the date thereof. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article III, Section 1:

> The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.

Constitution of the United States, Article III, Section 2:

> The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .

Fifth Amendment to the Constitution of the United States:

> Nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Uniformed Services Former Spouses Protection Act [Pub.L. 97-252; 10 U.S.C. §§ 1006(a),(b) and 1408(c)(1)]:

§ 1006(a). The amendments made by this title shall take effect on the first day of the first month which begins more than 120 days after the date of the enactment of this title.

(b). Subsection (d) of Section 1408 of title 10, United States Code as added by Section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order which became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

§ 1408(c)(1). Subject to the limitation of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as the property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

STATEMENT OF FACTS

On July 1, 1969, Petitioner, LaVerne William Brown, Jr. (hereinafter "CAPT. BROWN"), filed a complaint for the dissolution of the parties' marriage with the Superior Court for the State of California, County of San Diego, as Case No. D 36551. An Interlocutory Judgment of Dissolution of Marriage was entered in said divorce proceeding on January 29, 1970. (See Appendix A.) CAPT. BROWN'S military retirement benefits were mentioned during the trial of the dissolution proceeding. However, the Interlocutory Judgment did not make any reference to CAPT. BROWN'S military retirement benefits.

CAPT. BROWN retired from active duty with the United States Navy on June 30, 1974. On May 27, 1975, after the decision of the California Supreme Court in *In Re Marriage of Fithian* (1974) 10 Cal.3d 592,

Respondent, Rosamond F. Brown (hereinafter "MRS. BROWN"), filed the present proceeding with the San Diego County Superior Court for the partition of CAPT. BROWN'S military retirement benefits. This independent action was filed with the San Diego County Superior Court as Case No. 367326. On May 5, 1977, a judgment was entered in this proceeding which denied MRS. BROWN'S request for partition of CAPT. BROWN'S military retirement benefits. The trial court denied MRS. BROWN'S request for partition based upon laches and estoppel. (See Appendix B.) MRS. BROWN filed an appeal from this judgment. The judgment was ultimately reversed by the Court of Appeal, Fourth Appellate District, Division One, and remanded to the trial court with instructions to divide CAPT. BROWN'S retirement benefits in accordance with California Civil Code Section 4800(a) or Section 4800(b)(1). (See Appendix D.)

On December 7, 1979, this proceeding was reheard by the San Diego County Superior Court. At that time, the trial court determined that CAPT. BROWN should pay thirty-six and one-half percent (36½%) of all future military retirement benefits to MRS. BROWN. The trial court further determined that MRS. BROWN was entitled to receive thirty-six and one-half percent (36½%) of the pension benefits received by CAPT. BROWN between June 30, 1974 and November 30, 1979. However, for some unexplained reason, MRS. BROWN failed to prepare a written judgment reflecting the rulings of the trial court. (Please see Appendix G for discussion of this issue by the trial court.)

On June 26, 1981, the United States Supreme Court rendered its opinion in *McCarty v. McCarty* (1981) 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728. Thereafter, on May 13, 1982, the trial court granted CAPT. BROWN'S Motion for Entry of Judgment and filed its judgment in this proceeding consistent with its prior rulings in December, 1979. However, on July 23, 1982, the trial court vacated this judgment pursuant to California Code of Civil Procedure Section 662 and re-opened the case for further proceedings to consider the effect of the *McCarty* opinion. (See Appendix G.)

On September 8, 1982, President Reagan signed Senate Bill 2248, the fiscal year 1983 National Defense Bill. Title 10 of the bill is known as the Uniformed Services Former Spouses Protection Act (hereinafter "USFSPA"). (See Appendix M.) Several subsequent hearings were held before the trial court to consider the effect of the *McCarty* decision and USFSPA on this proceeding. On December 10, 1982, the trial court filed and served its Statement of Intended Decision. (See Appendix G.) The trial court ruled that USFSPA did not attempt to create any rights prior to June 25, 1981 [Section 1408(c)(1)] and therefore leaves untouched the rights that MRS. BROWN had at the time of the original trial in the dissolution proceeding in 1970. The trial court further ruled that, under *McCarty*, that MRS. BROWN never had a community property right to CAPT. BROWN'S military retirement benefits. On December 16, 1982, judgment was entered in this proceeding consistent with the trial court's Statement of Intended Decision. (See Appendix H.)

MRS. BROWN appealed this judgment to the Court of Appeal of the State of California, Fourth Appellate District, Division One. On May 9, 1983, MRS. BROWN served upon counsel for CAPT. BROWN her Motion for Summary Reversal. On August 10, 1983, the Court of Appeal heard oral argument relative to this Motion for Summary Reversal. Five (5) days later, on August 15, 1983, the Court of Appeal filed its opinion reversing the judgment. CAPT. BROWN vigorously argued the same constitutional issues addressed in this Writ before the trial court and the Court of Appeal. The Court of Appeal indicated in its opinion that it did not have to consider the constitutional effect of applying USFSPA retroactively since the doctrine of stare decisis required that the Court of Appeal adhere to the precedent of other intermediate California appellate courts on this issue. The Court of Appeal stated in a footnote:

> [2]Both in written and oral argument LaVerne's counsel vigorously urged us to consider the constitutional effect in applying the federal statute retroactively. Deference to the doctrine of stare decisis requires that we adhere to precedent. It is therefore unnecessary in this case to reach the constitutional issue. [Footnote 2 of the opinion of the Court of Appeal which appears on page 2 of Appendix I.]

On September 8, 1983, the Court of Appeal modified its opinion to direct the trial court to enter judgment in favor of MRS. BROWN as set forth in the May 12, 1982 judgment. On October 7, 1983, the Court of Appeal denied CAPT. BROWN'S petition for rehearing. CAPT. BROWN'S petition for hearing before the Supreme Court of the State of California was denied on November 23, 1983. (See Appendix L.)

REASONS FOR GRANTING THE WRIT

In its opinion, the California Court of Appeal stated that the issue addressed by this Court in *McCarty v. McCarty, supra*, is now moot in that USFSPA should be applied retroactively to the date of issuance of *McCarty* to all cases not final on February 1, 1983. The Court of Appeal cited *In Re Marriage of Buikema* (1983) 139 Cal.App.3d 689, *In Re Marriage of Sarles* (1983) 143 Cal.App.3d 24, *In Re Marriage of Camp* (1983) 142 Cal.App.3d 217, *In Re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, *In Re Marriage of Ankenman* (1983) 142 Cal.App.3d 883 and *In Re Marriage of Frederick* (1983) 141 Cal.App.3d 867. The following quotation from the *Buikema* case clearly expresses the view of the California courts on this issue:

> . . . However, retroactivity is now a moot issue because *McCarty* is no longer the law. On February 1, 1983, the Uniformed Services Former Spouses Protection Act (Public Law 97-252), an amendment to Title X of the United States Code, became effective. The Act overrules *McCarty*, stating "a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981 either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. Section 1408(c)(1).) California law treating military retirement pensions as community property is no longer preempted. The Act's legislative

> history clearly indicates Congress' intent to abrogate all applications of the *McCarty* decision. . . .
>
> *In re Marriage of Buikema, supra* at Page 691; see also *In re Marriage of Lockstrom* (1983) 148 Cal.App.3d 675 for a subsequent California opinion.

It is necessary for this Court to review this case in order to determine whether California's retroactive application of USFSPA to judgments which were final prior to the effective date of that statute violates federal constitutional principles. As noted by the trial court in its Statement of Intended Decision (see Appendix G), this action for partition is based upon the premise that MRS. BROWN had a community property interest in CAPT. BROWN'S retirement benefits at the time of the original trial of the dissolution action in 1970 and that she remains a tenant in common with CAPT. BROWN of those rights. See *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 403; *DeGodey v. DeGodey* (1870) 39 Cal. 157; *Metropolitan Life Insurance Company v. Welch* (1927) 202 Cal. 312, 318; *Tarien v. Cats* (1932) 216 Cal. 554, 559; and *Estate of Williams* (1950) 36 Cal.2d 289. However, USFSPA should not be applied retroactively so as to abrogate the opinion of this Court in *McCarty v. McCarty, supra*. The *McCarty* decision is declaratory of the characterization of CAPT. BROWN'S interest in his retirement benefits as of the time of the original trial in 1970. Thus, MRS. BROWN does not have any interest in CAPT. BROWN'S retirement benefits pursuant to *McCarty* which can be partitioned in this proceeding.

Several important subissues are subsumed within the determination of whether California's retroactive application of USFSPA to judgments which were final prior to the effective date of that statute violates federal constitutional principles. The first subissue is whether Congress actually intended to abrogate the decision of this Court in *McCarty v. McCarty, supra*, or whether Congress only intended USFSPA to operate prospectively. If Congress did intend to abrogate the decision of this Court in *McCarty v. McCarty, supra*, the second subissue is whether Congress has the power to abrogate a decision of this Court or whether an attempt to

do so violates the doctrine of separation of powers. The third subissue is whether an attempt by Congress to apply USFSPA retroactively to earlier State decisions which had become final prior to the effective date of USFSPA violates the due process clause of the Fifth Amendment to the United States Constitution.

CAPT. BROWN will deal separately with each of these issues below. However, before turning to an examination of these issues, it is important to note that the effect of USFSPA, if any, upon the *McCarty* decision is a federal question, not a State question. *Adam v. Saenger* (1938) 303 U.S. 59, 64, 82 L.Ed. 649, 652, 58 S.Ct. 454, 457; *McCarty v. McCarty* (1981) 453 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728. The California cases cited above which analyze the effect of USFSPA upon *McCarty* miss the point when they refer to State law to determine this issue. When dealing with a federal question, the determination by this Court of that question is binding upon the State courts and must be followed by the State courts. This Court has succinctly stated the rule as follows:

> But the vice of this position is that, in following its own prior decision, the Court ignored the decision of this Court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this Court of that question is binding upon the State courts and must be followed, any State law, decision, or rule to the contrary notwithstanding. *Chesapeake & Ohio Railway Company v. Martin* (1931) 283 U.S. 209, 220-221, 75 L.Ed. 983, 990, 51 S.Ct. 452, 458.

Thus, the determination of this issue by this Court is binding upon the California courts.

A. THE DECISION OF THE UNITED STATES SUPREME COURT IN *MCCARTY V. MCCARTY, SUPRA*, IS ENTITLED TO RETROACTIVE EFFECT; CONGRESS INTENDED THAT USFSPA WOULD ONLY OPERATE PROSPECTIVELY FROM ITS EFFECTIVE DATE.

Normally, statutes operate only prospectively, while judicial decisions operate retrospectively. In *United States v. Security Industrial Bank* (1982) ____ U.S. ____, 74 L.Ed.2d 235, 103 S.Ct. 407, this Court stated the applicable rule as follows:

> The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. This Court has often pointed out that
>
> > the first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights. . . unless such be the "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature. (citations omitted) *Id.* 74 L.Ed.2d at 243-244, 103 S.Ct. at 413, citing *Union Pacific Railroad Company v. Laramie Stock Yards Company* (1913) 231 U.S. 190, 199, 58 L.Ed. 179, 182, 34 S.Ct. 101, 102.

In *United States v. Security Industrial Bank, supra*, creditors loaned debtors money and perfected liens on certain property held by the debtors. Subsequently, by amendment to the applicable bankruptcy statutes, Congress exempted as property to be included in the debtors' bankruptcy estate the property subject to the liens. The Court of Appeals determined that Congress intended to invalidate liens acquired before the enactment date of the statute and that the amendment to the Bankruptcy Act was therefore retroactive. However, the Court of Appeals held that

such an application violated the Fifth Amendment since it effected a complete taking of the secured creditors' property interest. This Court stated that retroactive destruction of the creditors' lien probably would not comport with the Fifth Amendment. However, this Court avoided a holding of unconstitutionality of the amendment to the Bankruptcy Act by affording it prospective operation, stating:

> The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction of the Appellees' liens in these cases comports with the Fifth Amendment. We now consider whether, as a matter of statutory construction, section 522(f)(2) must necessarily be applied in that manner. We consider the statutory question because of the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." (citations omitted) *United States v. Security Industrial Bank, supra* at 74 L.Ed.2d 235, 243, 103 S.Ct. 407, 412.

The question of USFSPA'S constitutionality can be avoided if USFSPA is construed to operate prospectively only. USFSPA itself clearly indicates that it was only intended to operate prospectively. It seems logical to start with the Act itself. Unfortunately, no California court so far has deemed this an appropriate starting place.

The express language of USFSPA indicates that Congress did not intend for USFSPA to abrogate the effect of the *McCarty* decision. 10 U.S.C. Section 1408(c)(1) of USFSPA provides that "a court may treat disposable retired or retainer pay payable to a member for pay periods *beginning after June 25, 1981*, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." [emphasis added.] The only permissible meaning of this language is that State courts may follow the law of their own jurisdiction in determining the characterization of retired pay accruing *after* June 25, 1981. This is the only constitutional interpretation of this language.

More importantly, 10 U.S.C. Section 1006(a), entitled "Effective Dates and Transition", states that the basic provisions of USFSPA shall apply *only* with respect to payments of retired or retainer pay for periods beginning *on or after* the effective date of the Act. The Act became effective February 1, 1983. 10 U.S.C. Section 1006(b), (c) and (d) all state that these subsections "shall apply" only "on or after the effective date of" "this title". Furthermore, subsection (b) states that "in the case of a court order which became final before June 26, 1981, payments under such subsection *may only be made in accordance with such order as in effect on such date* and without regard to any subsequent modifications." Thus, the express language of the Act itself indicates that Congress did not intend to make the Act fully retroactive. If Congress had in fact intended a full retroactive effect, one wonders why Congress simply did not express its intent to do so in clear language. (CAPT. BROWN submits that Congress did not make the effective date fully retroactive because any such attempt on the part of Congress to do so would violate the doctrine of separation of powers and the due process clause of the Fifth Amendment as discussed below.)

B. CONGRESS DID NOT, AND CANNOT, ABROGATE THE DECISION OF THE UNITED STATES SUPREME COURT IN *MCCARTY V. MCCARTY, SUPRA*, SO AS TO PERMIT USFSPA TO BE APPLIED RETROSPECTIVELY SINCE THIS WOULD VIOLATE THE DOCTRINE OF SEPARATION OF POWERS.

If Congress did in fact intend for USFSPA to abrogate the decision of this Court in *McCarty v. McCarty, supra*, as determined by the California courts, CAPT. BROWN respectively submits that the Act constitutes an unconstitutional usurpation by Congress of the powers given to this Court pursuant to Article III of the Constitution. None of the California decisions holding that USFSPA abrogates the *McCarty* decision even consider the effect of the doctrine of separation of powers. The Court of Appeal below refused to consider this Constitutional issue. (See Appendix I-2.) Although the doctrine of separation of powers was not

explicitly incorporated into the Constitution of the United States, it is there implicitly. 2 Antieau, *Modern Constitutional Law* Section 11:13, page 200 (1969). This Court has stated with respect to the doctrine of separation of powers:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments - the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands. . .
>
> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should keep independent of the others - independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a Justice of this Court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." . . . *O'Donoghue v. United States* (1932) 239 U.S. 516, 530, 77 L.Ed. 1356, 1360, 53 S.Ct. 740, 743.

Additionally, this Court has noted that "the principle of separation of powers was not simply an abstract generalization in the minds of the framers: it was woven into the documents that they drafted in Philadelphia in the Summer of 1787". *Immigration and Naturalization Service v. Chadha* (1983) ____ U.S. ____, 77 L.Ed.2d 317, 341, 103 S.Ct. 2764, 2781; see also *Buckley v. Valeo* (1976) 424 U.S. 1, 124, 46 L.Ed.2d 659, 747, 96 S.Ct. 612, 624.

The separation of powers doctrine precludes Congress from setting aside, annulling or overruling a final judgment rendered by the courts of the United States. This fundamental principle has long been recognized by this Court. In *United States v. Klein* (1872) 80 U.S. (13 Wall) 128, 20 L.Ed. 519, this Court voided an act of Congress which attempted to prohibit the Court from independently considering evidence in a case before it. The Court stated: "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power". *Id.* 80 U.S. (13 Wall) at 147, 20 L.Ed. at 525; see also *Pennsylvania v. Wheeling & Bellmont Bridge Co.* (1856) 59 U.S. (18 HOW.) 421, 431, 15 L.Ed. 435, 437; *McCullough v. Virginia* (1898) 172 U.S. 102, 43 L.Ed. 382, 19 S.Ct. 134; and *Hodges v. Snyder* (1922) 261 U.S. 600, 604, 67 L.Ed. 819, 821, 43 S.Ct. 435, 436.

Our federal courts have repeatedly recognized this principle. In *Resident Advisory Board v. Rizzo* (E.D.Pa. 1979) 463 F.Supp. 464, the Federal District Court for the Eastern District of Pennsylvania dealt with this same issue. In the *Rizzo* case, the Court entered an order on November 5, 1976, directing the Philadelphia Housing Authority, the Philadelphia Redevelopment Authority and the Department of Housing & Urban Development to immediately construct town houses on a project known as the "Whitman site". The Court made its ruling based upon a finding that these entities had previously failed to act as a result of racial discrimination. The Third Circuit Court of Appeals affirmed the District Court's order on August 31, 1977 and *certiorari* was denied by the United States Supreme Court on February 27, 1978. *Resident Advisory Board v. Rizzo*, 25 F.Supp. 987 (E.D.Pa. 1976), *affirmed in relevant part*, 564 F.2d 126 (3d Cir. 1977), *certiorari denied*, 435 U.S. 908 (1978).

Thereafter, on December 21, 1979, the Philadelphia City Council refused to pass an ordinance approving the redevelopment contract for the Whitman site. On the same day, the City Council passed a resolution requesting the Redevelopment Authority of Philadelphia to prepare a plan to select a redeveloper for the development of low income dwelling

units on scattered sites. In the ensuing litigation, the District Court held that federal judicial decisions are the law of the land and cannot be abrogated by legislative action. The Court stated:

> *CITY COUNCIL CANNOT ABROGATE THE COURT'S DECISION*
>
> The recent happenings in the City Council of Philadelphia cannot interfere with the November 5, 1976 judgment of this Court, as affirmed by the Third Circuit Court of Appeals, concerning which *certiorari* was denied by the Supreme Court of the United States, which judgment ordered the construction of townhouses on the Whitman Park site. Should there come a day when the Council of the city, by a majority vote of its members, can overturn or obstruct a decision of the federal judiciary holding that the rights of a minority in the city were violated by the actions of city government, it would mean that the elected body of a city could effectively abrogate those inalienable rights guaranteed to all of us in the Constitution. It would mean that the judicial system of this nation, established pursuant to Article III of the Constitution, a judicial system upon which this nation has come to rely in times of crisis, would be without the power to endorse its decrees and would crumble. Fortunately, ours is a nation committed to the rule of law and our elected representatives are not above the law. It must be so under our Constitution, which guarantees rights to individuals, rights which cannot be destroyed by the democratically determined actions of the majority. *IT FOLLOWS THEREFORE, THAT, ALTHOUGH FEDERAL JUDICIAL DECISIONS DO FREQUENTLY INCUR THE WRATH OF THE MAJORITY, UNDER OUR TRIPARTITE CONSTITUTIONAL FORM OF GOVERNMENT, SUCH DECISIONS ARE THE LAW OF THE LAND AND CANNOT BE ABROGATED BY LEGISLATIVE ACTION. IT IS BEYOND QUESTION THAT LEGISLATIVE ACTION CANNOT NEGATE A CONSTITUTIONALLY BASED JUDICIAL DECISION.* As the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 490-91, 86 S.Ct. 1602, 1636, 16 L.Ed.2d 694 (1966), stated:

> Judicial solutions to problems of constitutional dimensions have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them. [Emphasis added.]

Resident Advisory Board v. Rizzo, supra at p. 700, *affirmed* 595 F.2d 1214 (3d Cir. 1979), *cert. denied* at 442 U.S. 947; see also *Cerro Metal Products v. Marshall* (E.D.Pa. 1979) 467 F.Supp. 869, 877-878, *affirmed* 60 F.2d 963 (3d Cir. 1979); see also *Hunter v. United States* (W.D.Mo. 1935) 10 F.Supp. 1014, 1015; see also *Personal Finance Company of Braddock v. United States* (D.C. Del. 1949) 86 F.Supp. 779, 784.

The California Supreme Court, in the context of state action, recognizes that the legislature cannot set aside, annul or overrule final judgments of court. See *Mandel v. Meyers* (1981) 29 Cal.3d 531, 546-548; see also *People v. Savala* (1981) 116 Cal.App.3d 41, 60-61. In *Mandel v. Meyers, supra*, the California Supreme Court quotes with approval the following explanation of the Supreme Judicial Court of Massachusetts speaking in *Denny v. Matoon* (1861) 84 Mass. (2 Allen) 361 [79 Am.Dec. 784]:

> [i]t is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. . . . [A]n act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority. . . . To vest in the legislature the power to take them away, or to impair their effect on the rights of parties, would be to deprive the judiciary of its most essential prerogative. . . . It is obvious that such an exercise of [legislative] authority would lead to the entire destruction of the order and harmony of our system of government, and to a manifest infraction of one of its fundamental

> principles. Indeed, it is difficult to see how the legislature could more palpably invade the judicial department and effectively usurp its functions, than to pass statutes which should operate to set aside or annul judgments of courts in their nature final, and which would otherwise be conclusive on the rights of parties. *Mandel v. Meyers, supra* at pages 547-548.[1]

These authorities clearly establish that Congress cannot overrule a decision of this Court in *McCarty v. McCarty, supra*, by making USFSPA operate retrospectively. Any such attempt by Congress would usurp the powers given exclusively to the courts by the Constitution. The California decisions holding that USFSPA overrules *McCarty* and renders it moot are contrary to the decisions of this Court. These California decisions overlook the separation of powers doctrine and render it meaningless. If the California courts are correct, Mrs. McCarty herself could now come back into court to modify her judgment to claim a share of her former spouse's retirement benefits.[2]

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[1] In *People v. Savala* (1981) 116 Cal.App.3d 41, a California Appellate Court dealt with the identical question presented to this Court, only in a criminal context. In a footnote, the California Appellate Court succinctly stated: "... The plain issue is whether an intermediate appellate court may retroactively apply what purports to be a legislative declaration of intent of prior legislation, which has, in the intervening period, been interpreted by our Supreme Court contrariwise to the subsequent clarification of legislative intent. To state the issue is to state the answer. The intermediate court must follow the controlling decisional law. To find otherwise invites chaos. We suggest our dissenting colleague misperceives his position and needs reminding that he is a member of an intermediate appellate court". *Id.* at pages 60-61. It appears that the direction being taken by the California Courts is to permit Congress to abrogate decisions of this Court while refusing to allow the California Legislature to abrogate or change retroactively decisions of the California courts.

[2] The California courts are not alone in applying USFSPA retroactively to nullify this Court's decision in *McCarty v. McCarty, supra*. The California State legislature has enacted California Civil Code Section 5124, effective January 1, 1984. This section provides, *inter alia*: "(a) Community property settlements, judgments or decrees which became final on or after June 25, 1981, and before February 1, 1983, may be modified to include a division of military retirement benefits payable on or after February 1, 1983, in a manner consistent with Federal law and the law of this State as it existed before June 26, 1981, and as it has existed since February 1, 1983". Although the constitutionality of this State statute is not presently before this Court, the enactment of this statute shows the

(Footnote 2 continued on page 18.)

Carrying this proposition to its logical conclusion, Congress would have the power to retroactively overturn any judgment which has become final since the adoption of the Constitution in 1789. Needless to say, Congress cannot, and does not have the power to, jeopardize the finality and independence of judicial action in this manner. Accordingly, it is necessary for this Court to hear this case and to reiterate not only that the doctrine of separation of powers exists as a valid constitutional principle, but that USFSPA operates only prospectively.[3]

(Footnote 2 continued from page 17.)

extent of the concerted effort which both the California legislature and California courts have made to place an impermissible construction on USFSPA and its retroactive effect upon the *McCarty* decision.

[3] One California Appellate Court has supported the position of CAPT. BROWN in a similar fact situation. In *Sharpe v. Superior Court* (1983) 143 Cal.App.3d 469, Defendant Sharpe represented Plaintiff Mrs. Beronio in a 1968 action for separate maintenance. Mrs. Beronio obtained a judgment incorporating a property settlement agreement which made no provision for disposition of her husband's vested military retirement pension. In 1977, Mrs. Beronio filed a second action for partition of the retirement benefits, or alternatively, damages for Sharpe's malpractice in failing to obtain a share of the pension in the 1968 action. The actions were severed. The trial court denied Mrs. Beronio's claim for a share of the pension. During the course of the subsequent appeal, the *McCarty* decision was rendered and applied by stipulation of the parties to defeat Mrs. Beronio's claim. Sharpe's subsequent motion for judgment on the pleadings in the severed malpractice action was denied. Sharpe filed a Writ of Mandate to the Court of Appeal which stated, *inter alia*: ". . . *McCarty* is declaratory of the meaning of Federal statutes which were in effect at the time of Sharpe's alleged negligence. By that law Mrs. Beronio never had a property right in her ex-spouse's military pension capable of being forfeited. She has no vested right in erroneous California law, which might have been applied to her claim had it been timely raised. The principles of res judicata that insulate a final, albeit erroneous, judgment from relitigation provide no relief. (See generally Rest.2d *Judgments*, Section 17, pp. 148-151.) Mrs. Beronio had no judgment giving her rights in Mr. Beronio's pension". *Id.* at 473. Thus, California Courts seemingly apply *McCarty* retroactively to bar an attorney malpractice action; but not to bar a division of the service member's retired pay. Such a distinction does not afford equal protection of law to all.

C. CONGRESS DID NOT, AND CANNOT, ABROGATE THE DECISION OF THE UNITED STATES SUPREME COURT IN *MCCARTY V. MCCARTY*, SINCE AN ATTEMPT TO RETROACTIVELY APPLY USFSPA WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

If Congress did in fact intend to abrogate the decision of this Court in *McCarty v. McCarty, supra*, and to apply USFSPA retroactively to judgments which were final prior to the effective date of USFSPA, such an attempt on the part of Congress would not only violate the separation of powers doctrine, but also the due process clause of the Fifth Amendment. This Court has long recognized that Congress cannot retroactively take away rights which have vested by a judgment. This Court has stated:

> . . . it is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases. . . . *McCullough v. Virginia* (1898) 172 U.S. 102, 123-124, 43 L.Ed. 382, 389-390, 19 S.Ct. 134, 137-140; see also *Pennsylvania v. Wheeling & Bellmont Bridge Co.* (1856) 59 U.S. (18 HOW.) 421, 429, 15 L.Ed. 435, 437; see also *United States v. Klein, supra*, 80 U.S. (13 Wall) at 146, 20 L.Ed. at 525; *Hodges v. Snyder* (1922) 261 U.S. 600, 603, 67 L.Ed. 819, 822, 43 S.Ct. 435, 436.

In *McCarty v. McCarty, supra*, this Court concluded that military retired pay is reduced compensation for reduced current services. *Id.* 453 U.S. at 232, 69 L.Ed.2d at 599, 101 S.Ct. at 2736. Since military retired pay is reduced compensation for reduced current services, one could argue that military retired pay is not "property" within the meaning of the Fifth Amendment. CAPT. BROWN submits that this analysis is incorrect.

In *United States v. Larionoff* (1977) 431 U.S. 864, 53 L.Ed.2d 48, 97 S.Ct. 2150, the Plaintiff military members had extended their enlistments in return for a promise that a bonus award would be paid to them for their commitment to extend active duty service. Prior to the expiration of the re-enlistment term, military regulations altered the nature of the bonus program. Certain members who had re-enlisted were omitted in the new regulations as eligible to receive the bonus. Plaintiffs argued that Congress had not intended to divest them of rights they had already earned and that the subsequent military regulations where therefore invalid. In holding for Plaintiffs, this Court stated:

> What we said above as to Larionoff goes far toward answering this question. The intention of Congress in enacting the VRB was specifically to promise to those who extended their enlistments that a VRB award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service. When Johnson made that commitment, by entering an agreement to extend his enlistment, he, like Larionoff, became entitled to receive at some future date a VRB at the award level then in effect (provided that he met the other eligibility criteria). Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.
>
> *Of course, if Congress had such an intent, serious constitutional questions would be presented.* No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprives members of benefits they had expected to be able to earn. Cf. *Bell v. United States*, 366 U.S. 393 (1961); *United States v. Dickerson*, 310 U.S. 554 (1940). It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional

> light. *United States v. Larionoff, supra*, 431 U.S. at 878-879, 53 L.Ed.2d at 60, 97 S.Ct. at 2159. (Emphasis added.)[4]

CAPT. BROWN retired from active duty with the United States Navy on June 30, 1974. Pursuant to the opinion of the Court of Appeal below, CAPT. BROWN must pay MRS. BROWN retroactively thirty-six and one-half percent (36½%) of all retirement benefits received by him from June 30, 1974 to the present date. In the *Larionoff* case, Petitioners Larionoff and Johnson had not received their compensation for the right in question. However, this Court still found Petitioners had acquired a vested right which could not be taken from them without compensation. Contrast this with Captain Brown's situation. Unlike Larionoff and Johnson, CAPT. BROWN had already received his retired pay for eight and one-half (8½) years by the time USFSPA became effective on February 1, 1983. Under the *Larionoff* opinion, there cannot be any dispute but that the retired pay earned by CAPT. BROWN up to the effective date of USFSPA constituted property since the services had already been rendered. A "taking" is not necessarily limited to outright acquisitions by the government for itself. *United States v. Security Industrial Bank, supra*, ____ U.S. ____, 74 L.Ed.2d at 242, 103 S.Ct. at 412. If Congress intended to apply USFSPA retroactively to abrogate the effect of the *McCarty* decision, this action on the part of Congress would constitute a clear violation of the due process clause contained in the Fifth Amendment.[5]

---

[4] In *Costello v. United States* (9th Cir. 1978) 587 F.2d 424, *cert. den.* (1979) 442 U.S. 929, the Ninth Circuit Court of Appeals stated with reference to the above quoted language from *Larionoff* that in a case involving military retired pay, it would "proceed on the assumption, arguendo, that if retirement pay had been fully earned at the date of retirement it would not be divested without compensation."

[5] This proceeding involves a substantial sum of money. Pursuant to the judgment entered May 12, 1982, MRS. BROWN'S share of CAPT. BROWN'S military retirement benefits received between June 30, 1974 and November 30, 1979, amounted to $50,676.19. (See Appendix E.) Pursuant to the opinion of the Court of Appeal below, MRS. BROWN would be entitled to this sum plus thirty-six and one-half percent (36½%) of all retirement benefits received by CAPT. BROWN after November 30, 1979.

However, this Court's due process analysis should not be limited only to the retired pay received by CAPT. BROWN up to the effective date of USFSPA. In the area of Social Security disability benefits, this Court has recognized "that the interest of an individual in continued receipt of those benefits is a statutorily created 'property' interest protected by the Fifth Amendment". *Mathews v. Eldridge* (1975) 424 U.S. 319, 332, 97 L.Ed.2d 18, 32, 96 S.Ct. 893, 901. CAPT. BROWN faithfully served his country and as clarified by the *McCarty* decision, acquired a vested, separate property right in the continued receipt of his retired pay. Under California law, the right which Mrs. Brown now asserts must have existed at the time of trial in 1970. By virtue of this Court's decision in *McCarty v. McCarty, supra*, Mrs. Brown did not have any rights in CAPT. BROWN'S retired pay in 1970. Thus, Congress' attempt to abrogate the effect of *McCarty v. McCarty* through the retroactive application of USFSPA, constitutes a "taking" of CAPT. BROWN'S vested, separate property right in the continued receipt of his retired pay.

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for Writ of Certiorari. It is necessary for this Court to determine whether Congress intended for USFSPA to operate retrospectively to abrogate the decision of this Court in *McCarty v. McCarty, supra*. More fundamentally, it is necessary for this Court to determine whether Congress has the power to abrogate a decision of this Court by enacting retroactive legislation. The interpretation of the retrospective versus prospective operation of USFSPA is a critical question concerning the interpretation and effect of an important federal statute and should be decided.

In *Ridgeway v. Ridgeway* (1981) 454 U.S. 46, 70 L.Ed.2d 39, 102 S.Ct. 49, this Court stated:

> Notwithstanding the limited application of federal law in the field of domestic relations generally, see *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S.

> 586, 593-594 (1890), this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of State law, or to prevent the frustration and errosion of the congressional policy embodied in the federal rights. *Id.*, 454 U.S. at 54, 70 L.Ed.2d at 47, 102 S.Ct. at 54.

In discussing the effect of USFSPA upon the *McCarty* decision, the trial court in this proceeding stated: "The United States Supreme Court's interpretation of Congressional legislation binds everyone, including Congress." (See Appendix G-9.) However, the California appellate courts have disagreed with this statement. To date, the California appellate courts have successfully emasculated the *McCarty* decision by holding that Congress abrogated *McCarty* by the enactment of USFSPA. The California courts erroneously rely on State law, *i.e.*, stare decisis, rather than federal law to reach this conclusion. The California courts fail to even consider the constitutionality of this position in light of the separation of powers doctrine and due process clause of the Fifth Amendment to the United States Constitution. The statement by the Court of Appeal in this proceeding that it was unnecessary to consider these constitutional issues typifies the approach of the California courts to this issue. (See Appendix I-2.)

Neither California, nor any other State, should be permitted to emasculate a decision of this Court in this fashion. For these reasons, this Court should grant the Petition for Writ of Certiorari to review these serious constitutional issues.

Dated: February 17, 1984

Respectfully submitted,

PORTER & HUFFMAN

By: JOHN W. PORTER, JR.
DAVID M. HUFFMAN

Attorneys for Petitioner

APPENDICES

HERVEY & MITCHELL
Attorneys at Law
Suite 1204, 530 Broadway
San Diego, California 92101
233-7787
Attorneys for Petitioner

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

In re the marriage of

Petitioner: LaVERNE WILLIAM BROWN, JR.,

and

Respondent: ROSAMOND F. BROWN

CASE NUMBER

D 36551

INTERLOCUTORY JUDGMENT OF DISSOLUTION OF MARRIAGE

This proceeding was heard on January 9 & 12, 1970 before the Honorable JOHN A. HEWICKER, Department No. 18.

The court acquired jurisdiction of the respondent on July 1, 1969 by:

☐ Service of process on that date, respondent not having appeared within the time permitted by law.

☒ Service of process on that date and respondent having appeared.

☐ Respondent on that date having appeared.

The court orders that an interlocutory judgment be entered declaring that the parties are entitled to have their marriage dissolved. This interlocutory judgment does not constitute a final dissolution of marriage and the parties are still married and will be, and neither party may remarry, until a final judgment of dissolution is entered.

The court also orders that, unless both parties file their consent to a dismissal of this proceeding, a final judgment of dissolution be entered upon proper application of either party or on the court's own motion after the expiration of at least six months from the date the court acquired jurisdiction of the respondent. The final judgment shall include such other and further relief as may be necessary to a complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

The court finds that both parties are fit and proper persons to be awarded the care, custody and control of their four minor children, namely, PATRICIA, born April 25, 1950; WILLIAM, born November 22, 1952; ROBERT, born December 12, 1954; and BARBARA, born December 12, 1954.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the parties are awarded joint custody of said minor children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the children may reside with the parent of their choice, subject to rights of reasonable visiation [*sic*] by the non-custodial parent, and the children have presently expressed a preference to reside with petitioner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner shall pay reasonable transportation expenses related to said visitation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner pay to respondent, as and for her support and maintenance, the sum of $400 per month, commencing February 1970 and continuing at regular monthly intervals thereafter until respondent remarries, or further order of Court whichever occurs first. Provided, however, that petitioner may satisfy said $400 monthly support obligation by paying $350 per month in the form of a government allotment in favor of respondent.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that respondent is awarded the following items, formeraly [*sic*] the community property of the parties, as her sole and separate property:

A. The residential real property commonly known as 812 H Avenue, Coronado, California 92118.

B. The 1967 Pontiac automobile.

C. The household furniture furnishings and appliances presently in her possession with the exception of the items of personal property hereinafter specifically awarded to petitioner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner is awarded the following items, formeraly [*sic*] the community

property of the parties, as his sole and separate property:

A. The 1960 Rambler automobile.

B. The 1960 Buick automobile.

C. The camping trailer.

D. The household furniture, furnishings and appliances presently in his possession.

E. The items set forth in Exhibit "A" attached hereto, and incorporated herein at this point by this reference. Respondent shall cooperate in returning said items to petitioner.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner pay to respondent's attorneys of record herein, ASHLEY, BRADY & CERNIGLIA, the sum of $750 attorneys fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the funds presently on deposit in the North Island Federal Credit Union totalling approximately $11,000 shall be withdrawn by petitioner and deposited in the trust account of his attorneys, HERVEY & MITCHELL, to be distributed as follows:

A. The real estate taxes now due on the "H" Avenue property to be paid in the amount of approximately $350.

B. Any deficiency on the parties joint State and Federal Income Tax Returns for calendar year 1969 to be paid. This deficiency is estimated to be approximately $1,000.

C. The remaining funds in said account shall be divided equally between the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that respondent shall pay and hold petitioner harmless from the obligations to Shell Oil Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that respondent shall pay the obligation to Dr. Appleford unless petitioner is able to have it paid through the U.S. Navy Champus program.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that otherwise petitioner shall pay and hold respondent harmless from the parties obligations incurred prior to their separation, namely, June [illegible], 1969.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that petitioner is awarded the policies of insurance on his life, provided, however, that he shall name the children as the equal primary beneficiaries on the following policies, shall maintain them in full force and effect and shall not further encumber them, until all of said children attain the age of twenty-one years, or are fully emancipated:

COMPANY	FACE VALUE
New York Life	$ 2,000
Prudential Life	1,000
Investors Guarantee Life	10,000

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties are mutually restrained and enjoined from annoying, harassing, or in any manner interfering with one another, and from going to or about the other's place of residence or employment.

Dated: JAN 29 1970

JOHN A. HEWICKER
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

ASHLEY, BRADY & CERNIGLIA

[illegible]
JOHN A. BRADY, Attorneys for Respondent

EXHIBIT "A"

Bedspread (hand crocheted)
Cruise books
Cups (Navy squadron)
Silver tray (gift from squadron)
Clock (gift from squadron)
Bed lamps (boy's beds)
Foot lockers (6)
Steamer trunks (2) (for Pat)
Diplomas, commissions and similar documents
"Navy Wolf" cartoon
Khaki uniform
Calling card tray
Curtain rods beonging [*sic*] to Navy
¼ size violin
Professional and personal books
Japanese prints, pictures
Tools
Personal jewelry
Clothing and athletic equipment
Miscellaneous belongings of a personal nature

HERVEY, MITCHELL, ASHWORTH & KEENEY
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW
SUITE 1204 SAN DIEGO TRUST & SAVINGS BUILDING
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Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

ROSAMOND F. BROWN, Plaintiff vs. LAVERNE WILLIAM BROWN, JR., DOES I through X, inclusive, Defendants.	NO. 367 326 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of the above entitled cause was regularly concluded on September 16, 1976, in Department 22 of the above entitled Court, the Honorable Jack R. Levitt, Judge Presiding, plaintiff appearing in person and by her counsel, Lawton, Christensen, Fazio, McDonnell, Briggs, Ward and DeSales, by Steven E. Briggs, and defendant appearing in person and by his counsel, Hervey, Mitchell, Ashworth & Keeney, by Thomas Ashworth, III. The Court heard the testimony and examined the proofs offered by the parties, and the cause was submitted to the Court for decision. The Court now makes if Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds that:

1. Plaintiff, having all the facts upon which to file an action, waited more than 5 years after entry of the final decree of dissolution to litigate the issue of the defendant's military retirement benefits.

2. Defendant relied to his detriment on the finality of the Final Judgment of Dissolution entered in this Court on February 4, 1970, in that he remarried and structured his financial life around his retirement income.

3. Plaintiff at the time of the dissolution action knew that the Defendant had served in the United States Navy for 25 years and was eligible for retirement benefits.

4. Defendant was unaware during the 5 years between the dissolution proceedings and the present action of any intentions of the Plaintiff with respect to his retirement income.

5. By not appealing the distribution of property awarded in the dissolution proceedings, Plaintiff induced Defendant to rely upon the finality of the property issue.

6. Defendant, in remarrying and structuring his financial future around his retirement income, did rely on the Plaintiff's conduct and acquiescence following the dissolution proceedings.

7. Both Plaintiff and Defendant throughout this proceeding as well as the earlier dissolution proceeding were represented by counsel.

8. During the trial of the parties' dissolution action, the court, in recognition of the Defendant's vested rights in his retirement income, awarded Plaintiff community real property valued at between $15,000 and $20,000 with no offsetting award to Defendant.

CONCLUSIONS OF LAW

Based on the Findings of Fact herein, the Court makes the following Conclusions of Law:

1. Defendant's right to retirement pay of the United States Navy is declared to be his sole and separate property.

2. Defendant has established the Second Affirmative defense of laches contained in his Answer to the Complaint on file herein.

4. That judgment be entered herein consistent with the foregoing Findings.

DATED: NOV 9 1976

JACK R. LEVITT

JUDGE OF THE SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

ROSAMOND F. BROWN,
Plaintiff,
vs.
LAVERNE WILLIAM BROWN, JR. etc., et al.,
Defendants.

CASE NO. 367 326
JUDGMENT

The above-entitled matter having come on regularly for hearing on September 16, 1976 and Findings of Fact and Conclusions of Law having been requested by Plaintiff, the Court has adopted the Findings of Fact and Conclusions of Law as submitted by Defendant and based on those Findings of Fact and Conclusions of Law,

IT IS ORDERED as follows:

1. Judgment is awarded to Defendant.

2. Defendant is awarded costs of suit herein in the sum of $36.50.

3. Defendant has established the Second and Fourth Affirmative Defenses.

4. Defendant's right to retirement pay is declared to be his sole and separate property.

APPROVED AS TO FORM AND CONTENT

HERSEY, MITCHELL, ASHWORTH & KEENEY

By _____
Thomas Ashworth

DATED: _____

_____
JUDGE OF THE SUPERIOR COURT

D-1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROSAMOND F. BROWN, Plaintiff and Appellant, v. LAVERNE WILLIAM BROWN, JR., Defendant and Respondent.	4 Civ. No. 16699 (Super. Ct. No. 367326)

APPEAL from a judgment of the Superior Court of San Diego County. Jack R. Levitt, Judge. Reversed.

Plaintiff Rosamond F. Brown seeks to partition personal property, to-wit: the military retirement benefits accrued during the marriage of these parties. The trial court determined that Rosamond had delayed too long -- five years from a decree dissolving the Browns' marriage -- before filing this action for partition. Laches and estoppel were the twin bases upon which the trial court denied Rosamond's relief.

FACTS

After approximately 22 years of marriage, Laverne in 1969 filed for divorce from Rosamond. Laverne was then in active United States military service but able to retire for years of service. The parties did not allege the retirement benefits from the United States Navy as a community or separate asset in the proceedings. The marriage of the parties was coincident with 73 percent of the 30 years Laverne was in military service. Neither the pleadings nor the judgment refer to this community asset. In oral discussions with the attorneys, the judge in the divorce proceeding did refer to the military pension rights on several occasions; however, he made no disposition of them.

In dividing the community property, the court awarded the equity in real property in Coronado, California, to Rosamond without a dollar-evaluated offsetting award to Laverne. The evidence was in conflict as to the fair market value of that property. Findings of fact and conclusions of law, right and time for appeal, were waived by respective counsel.

More than five years after the decree of dissolution had become final, Rosamond filed this action requesting a division of the retirement benefits. In the present proceeding, Laverne asserted Rosamond's action was barred by the doctrine of res judicata and collateral estoppel. He argued the issue of division of community property had already been tried on its merits with a resultant final judgment. Laverne also tendered the defenses of laches and estoppel.

On trial, this matter was submitted to the court upon the transcript of the 1970 dissolution proceedings and mutually acceptable offers of proof. That transcript is not part of the record on appeal; therefore we are not privy to its substance. However, from the unchallenged record before the trial court, we are able to glean its contents; the husband's retirement rights were mentioned in the dissolution proceedings on seven distinct occasions. The court made no disposition of those pension rights. The basis for the court's awarding the Coronado property to Rosamond was stated as:

"A. Loss of social security benefits;
"B. Loss of Veterans Widow's benefits . . .;
"C. Loss of hospitalization and surgical benefits;
"D. Loss of commissary priviledges [*sic*];
"E. Loss of insurance benefits."

The dissolution court stated it did not have the power to dispose of the pension rights at trial. Nor did it intend to take anything from Laverne on account of his retirement benefits. The court recognized the result might be the need for a further distribution at a later date.

Rosamond's offer of proof was to the effect there were no discussions in the 1970 proceedings between she and her counsel relative to any rights that might arise out of Laverne's retirement and that she had learned of such rights "three to four weeks" before filing this action.

Laverne's offer of proof was that following the 1970 decree, he asked his attorney to investigate the possibilities of appeal but no appeal was

taken because "Captain Brown felt that by getting his various military benefits that the overall decision was fair to him." These offers of proof were mutually accepted.

Based upon the foregoing evidence, the trial court found:

1. Rosamond waited more than five years after entry of the final decree of dissolution to litigate the issue of Laverne's military retirement benefits.

2. Laverne relied to his detriment on the finality of the final judgment of dissolution in that "he remarried and structured his financial life around his retirement income."

3. Rosamond, at the time of the dissolution action, knew Laverne had served in the United States Navy for 25 years and was eligible to retire.

4. Laverne was unaware during the five years between the disolution proceedings and the present action of any intentions of Rosamond with respect to his retirement income.

5. By not appealing the property award in the dissolution proceedings, Rosamond induced Laverne to rely upon the finality of the property issue.

6. Laverne in remarrying and structuring his financial future around his retirement income, relied on Rosamond's conduct and acquiescence following the dissolution proceedings.

7. The dissolution court, in recognition of Laverne's vested rights in his retirement income, awarded Rosamond community real property valued at between $15,000 and $20,000 with no offsetting award to Laverne.

The trial court made these conclusions of law: (1) Laverne's right to retirement pay of the United States Navy was his sole and separate property, and (2) Laverne had established defense of laches and the defense of estoppel.

Rosamond appeals contending the findings of the trial court on the issues of laches and estoppel are not supported by substantial evidence in the record and therefore do not authorize the judgment.

DISCUSSION

Before searching the record for substantial evidence, we examine the law applicable to the defense of laches.

Laches involves an unreasonable delay by a plaintiff in asserting a right to relief. (30 Cal.Jr.3d Equity, § 31.) The defense of laches requires an unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to defendant resulting from this delay. (*Conti v. Board of Civil Service Commissioners*, 1 Cal.3d 351, 359.) The Supreme Court has "consistently rejected the concept that lapse of time less than the period of limitations in itself constitutes a defense." (*Ibid.*)

It is not so much the question of lapse of time but rather whether prejudice has resulted. If the delay has caused no material change, i.e., no detriment to the party pleading laches, his plea is in vain. (*Conti v. Board of Civil Service Commissioners, supra*, at p. 362.)

To show prejudice for the purpose of laches, the party asserting the defense must show that he did or omitted to do something which detrimentally altered his position with respect to the claim or right asserted. The defense cannot be maintained on the basis of a possible hardship arising from a collateral matter without connection with the claims involved. (*In re Marriage of Nicolaides*, 39 Cal.App.3d 192.) It is Laverne's position that laches is applicable in that Rosamond was fully aware of the existence of the retirement rights at the time of the dissolution trial and he had remarried and structured his financial plans in reliance on the terms and conditions of the earlier judgment. It is true Rosamond was aware of the fact there were military retirement benefits; but that she was not aware she had a right to a community one-half of that pension is also conceded. Her representation concerning the time she acquired knowledge of such right is uncontradicted. Secondly, Laverne's representations on appeal that he has relied upon the judgment, restructured his financial plan, is not evidenced in any manner in the record before the trial court in this partition action. His offer of proof is absolutely silent on this matter. Moreover what the trial judge in

the 1970 proceedings did with respect to the pension rights shows no basis to support a conclusion of detrimental reliance. We can make only these sparse conclusions from the record. There was no litigation, no award made of the military pension to either party; there was an awareness of such pension and a mistaken belief shared by both parties that the pension belongs legally to the husband.

Further, Rosamond filed this lawsuit within three or four weeks after she learned of her legal rights respecting the pension. The record is totally silent, absent any evidence -- let alone substantial evidence -- to support the trial court's finding of laches.

With respect to the law applicable to the waiver and equitable estoppel urged upon the court as a basis for its judgment, we note: (1) waiver is to be distinguished from estoppel; it is the intentional relinquishment of a known right or alternatively, conduct that would warrant such inference (*Members Ins. Co. v. Felts*, 42 Cal.App.3d 617, 622) and (2) estoppel, by contrast, is a right arising from acts, admissions or conduct which have induced a change in position in accordance with the real or apparent intention of the party against whom they are alleged. Where a party tacitly encourages an act to be done he cannot afterwards exercise his legal right in opposition to that consent. (*Agmar v. Solomon*, 87 Cal.App. 127, 135.)

The court here did not find that a waiver had been factually established but rather that the defense of estoppel was proven. The court relied upon Rosamond's silence and inaction on the subject of pension right for a period of five years and Laverne's reliance upon that "inducement." What is missing to give rise to estoppel here is some duty on the part of Rosamond to speak or act during a period when she was unaware of her rights regarding the pension. No facts or authority point to such a duty.

> "Before equitable estoppel can be applied, four elements must be present: '"(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury."' [Citations.]" (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park, 45 Cal.App.3d 519, 531.)*

> "[I]f silence is relied upon to constitute the estoppel, such silence must be wilful or culpable and result in another placing himself in an unfavorable position on the faith in or understanding of a fact which the person remaining silent can contradict." (*Crothers v. General Petroleum Corp.*, 131 Cal.App.2d 98, 105.)

Further, the existence of estoppel is a question of fact. The burden of proof rests on the party asserting such estoppel. (*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park, supra*, 45 Cal.App.3d 519, 531.)

Here both parties refrained from appealing a judgment that was in error both as regarding the existence of, as well as the court's authority to dispose of, a community asset. The sparse evidentiary record before the trial court is again silent, lacking many facts to support an equitable estoppel.

Conversely, the record is without contradiction. Rosamond was unaware (as was Laverne) of *her rights* in the military pension until shortly before the filing of this action. This mutual unawareness -- shared by many in the legal community until *In re Marriage of Brown*, 15 Cal.3d 838, that military pension rights whether "vested" or "non-vested," "matured" or "non-matured" were an asset subject to appropriate division in a divorce proceeding -- cannot be translated by an "equitable-fairness" doctrine into laches or into a duty to speak or to act under penalty of loss of that right. These twin doctrines do not fit these facts. The loss of a valuable community asset or conversely its gain, resulting from a mutual mistake of law, is not the stuff of laches or equitable estoppel. We conclude the critical findings are not supported by substantial evidence.

Laverne points to a basic duty governing appellate courts process -- to construe findings liberally in support of the judgment. A sound ruling, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. (*Davey v. Southern Pacific Co.*, 116 Cal. 325, 329; *D'Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 19.)

Accordingly, we must examine the trial court's findings and judgment to ascertain whether it is correct on any theory of law applicable to the case.

The law is, and was, settled at the time of the interlocutory decree here "retirement benefits which flow from the employment relationship, to the extent they have vested, are community property subject to equal division between the spouses in the event the marriage is dissolved." (*In re Marriage of Fithian*, 10 Cal.3d 592, 596; *Waite v. Waite*, 6 Cal.3d 461; *Phillipson v. Board of Administration*, 3 Cal.3d 32; *French v. French*, 17 Cal.2d 775.) These authorities certify Rosamond's right had vested. Nor are we dealing with a "non-matured" right, as was involved in *In re Marriage of Brown, supra*, 15 Cal.3d 838, for Laverne's right to retire accrued before the entry of the interlocutory decree.

Rather, we confront here the settled principle of community property law that property which is not mentioned in the pleadings as community property and left unadjudicated by a decree of divorce is subject to future litigation, the parties being tenants in comcon [*sic*] meanwhile. (*In re Marriage of Elkins*, 28 Cal.App.3d 899, 903, cited with approval in *In re Marriage of Brown, supra*, 15 Cal.3d 838, 850-851; *in re Marriage of Cobb*, 68 Cal.App.3d 855, 860, fn. 1.)

Laverne's reliance upon *Smith v. Lewis*, 13 Cal.3d 349, is misplaced. The Supreme Court there had before it the question of lawyer malpractice by defendant Lewis who, in an earlier divorce proceeding, mistakenly believed that Smith's military retirement benefits were separate property. The question in *Smith v. Lewis* concerns the state of the law and the knowledge thereof with which a lawyer has charged concerning federal military pensions in the year 1967. Factually, *Smith v. Lewis* bears no relationship to the problem we here confront. Laverne raised below the contentions that the interlocutory decree was res judicata or operated as a collateral estoppel as to all questions determined in the dissolution proceedings, including *all* the property rights of the parties. Upon disputed evidence, the trial court here failed to place its judgment upon the grounds of res judicata or collateral estoppel. Substantial evidence from the record -- the transcript of the proceedings in the 1970 court hearing -- support this result. The trial court judgment is not supportable on any factual or legal theory apparent in this record.

The trial court shall, upon remand, divide the parties' interest in the pension rights in such proportion necessary to achieve the legislative

intent expressed in Civil Code section 4800, subdivision (a), or section 4800, subdivision (b)(I).

Judgment reversed.

WE CONCUR:

Acting P.J.

J.

I, ROBERT L. FORD, Clerk of the Court of Appeal, Fourth Appellate District, State of California, do hereby certify that the preceding and annexed is a true and correct copy of opinion as shown by the records of my office.

WITNESS my hand and the Seal of the Court this 25th day of July A.D. 1972

ROBERT L. FORD, Clerk

By Deputy Clerk

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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Area Code 714
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Attorneys for Defendants

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

ROSAMOND F. BROWN,
Plaintiff,
vs.
LAVERNE WILLIAM BROWN, JR., etc., et al.
Defendants.

Case Number 367326
JUDGMENT

This matter came on regularly for trial on December 7, 1979, in Department #21 of the above-entitled Court before the Honorable Louis M. Welsh, Judge. Plaintiff, ROSAMOND F. BROWN, appeared by and through her attorneys, Christison, Fazio, McDonald, Briggs, Ward, and Holland, by Steven E. Briggs. Defendant, LAVERNE WILLIAM BROWN, JR., appeared by and through his attorneys, Hervey, Mitchell, Ashworth, & Keeney, by Thomas Ashworth, III. All evidence having been presented, the matter having been argued by counsel for the respective parties, and the Court having taken the matter under submission and having filed its Notice of Intended Decision on December 24, 1979,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff, ROSAMOND F. BROWN, is awarded, as and for an equal division of the community property of the parties, 36-1/2% of the gross military retirement benefits received by Defendant, LAVERNE WILLIAM BROWN, JR., as said military retirement benefits are received by Defendant commencing on December 1, 1979.

2. Plaintiff, ROSAMOND F. BROWN, is awarded judgment against Defendant, LAVERNE WILLIAM BROWN, JR., in the amount of $50,676.19 as and for Plaintiff's one-half community share of the military retirement benefits received by Defendant between June 30, 1974 and November 30, 1979.

3. Plaintiff's request for prejudgment interest on her share of the military retirement benefits received by Defendant between June 30, 1974, and November 30, 1979, is denied.

APPROVED AS TO FORM:

CHRISTISON, FAZIO, MCDONALD, BRIGGS,
WARD & HOLLAND

BY:_____
Steven E. Briggs, Esquire
ATTORNEYS FOR PLAINTFF

DATED: MAY 12 1982

LOUIS M. WELSH

JUDGE OF THE SUPERIOR COURT

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest MAY 21 1982

ROBERT H. HAMMILL
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of San Diego.

JUANITA R. BRUCE

F-1

FILED
JUL 22 1982

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

ROSAMOND F. BROWN,

Plaintiff,

vs

LAVERNE WILLIAM BROWN, JR., etc., et al.,

Defendant.

No. 367326

ORDER

GOOD CAUSE APPEARING THEREFOR,

Motion for new trial is denied, and it is further ordered that the statement of decision of December 24, 1979 and the judgment entered May 12, 1982 are vacated and set aside and the case is reopened for further proceedings. (See Code of Civil Procedure Section 662.)

Dated July 22, 1982

LOUIS W. WELSH
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

ROSAMOND F. BROWN, Plaintiff, vs. LAVERNE WILLIAM BROWN, JR., etc., et al., Defendants.	CASE NO. 367326 STATEMENT OF INTENDED DECISION

In 1975, more than five years after her divorce, plaintiff sued her former husband to partition claimed community property rights in his military retirement. (See *DeGodey v. Godey* (1870) 39 Cal. 157; *Metropolitan Life Ins. Co. v. Welch* (1927) 202 Cal. 312, 318; *Tarien v. Katz* (1932) 216 Cal. 554, 559; *Estate of Williams* (1950 36 Cal.2d 289.) The retirement was disclosed during the divorce proceedings but no disposition thereof was made.

In 1970, the year of the parties' divorce, the question whether federal law authorized dividing military pensions as community property had not been decided (see *Henn v. Henn* (1980) 26 Cal.3d 323, 328). In 1972, the second division of the Court of Appeal for the Fourth District held that the question of a nonmilitary spouse's right to a community interest in military retirement "is evidently one of first impression." (*In Re Marriage of Karlin* (1972) 24 Cal.App.3d 25, 30.) It was not until 1974 when the California Supreme Court decided in *In Re Marriage of Fithian* (1974) 10 Cal.3d 592 that the dispute concerning the divisibility of military retirements was put to rest. Hence, this suit by plaintiff in 1975.

It is the current rejection of *Fithian* by the Supreme Court in *McCarty, infra*, and the reinstatement of the community property right in military retirement by the Congress that confronts us in this litigation.

In 1977 the trial court ruled against plaintiff and sustained defendant's defenses of laches and estoppel. Plaintiff appealed and on February 26, 1979 the Court of Appeal reversed, holding that plaintiff wife was not

barred by laches, estoppel or waiver; that her "right" to a community share in the military retirement existed in 1970 when the divorce was granted. Both parties, the Court stated, were under a mistaken belief that the pension belonged legally to the husband (opinion p. 6). The Court of Appeal concluded that "[t]he trial court shall, upon remand, divide the parties' interest in the pension rights in such proportion necessary to achieve the legislative intent expressed in Civil Code Section 4800, Subdivision (a) or Section 4800, Subdivision (b)(1)." (Pp. 10, 11.)

This court complied with the appellate court's mandate and after a hearing, minute orders were entered on December 7, and December 24, 1979 which ordered the former husband to pay 36.5% of his monthly retirement plus $50,676.19 in past accumulated retirement benefits to his former wife. For reasons best know [*sic*] to plaintiff and her counsel, no judgment was entered on this order and on June 26, 1981, the U.S. Supreme Court in *McCarty v. McCarty* (1981) 453 U.S. 210, 69 L.Ed.2d 589, over-ruled *Fithian* and decided that congressional legislation and the Supremacy Clause of the U.S. Constitution deprived the nonmilitary spouse of state community property rights in military pensions. Defendant husband then moved to enter judgment so that he could make a timely motion for new trial. The time to move for a new trial is calculated from the time a judgment has been signed or entered by the court (Code of Civil Procedure Section 659, *Ehrler v. Ehrler* (1981) 126 Cal.App.3d 147, 152). Plaintiff opposed the motion to enter judgment, contending that the previous minute orders were indeed judgments. But the minute orders of December 7 and December 24, 1979 were not judgments. They constituted a notice of intended decision and the proceedings of the trial court could not be concluded nor could post-trial motions or appeals be pursued without a judgment. (See California Rules of Court, Rule 232(a) and *Hadley v. Superior Court* (1972) 29 Cal.App.3d 389, 395-396.) *Hadley* has particular application since there, too, the moving party was the one who had lost the case and two years after the minute order sought a judgment so that post-trial motions and appeals could be undertaken.

At the hearing of March 22, 1982 on the motion to enter judgment the following occurred:

> "MR. BRIGGS: [plaintiff's counsel]
> Lastly it would be our request . . . that any judgment that is entered be entered *nunc pro tunc* to December 24 . . . 1979.

THE COURT: I think that would be appropriate. I'd be happy to do that."

The Court later reflected upon this, studied the law, and concluded it was inappropriate to enter judgment *nunc pro tunc. Nunc pro tunc* orders have as their objective the doing of ". . . justice to a litigant whose rights are threatened by a delay which is not his fault." Witkin, *California Procedure* 2nd Edition, Volume 4, Judgment Section 60, page 3222. In *Phillips v. Phillips* (1953) 41 Cal.2d 869, 875, Justice Traynor wrote: ". . . Courts have inherent power to enter judgments *nunc pro tunc* so as to relate back to the time when they should have been entered, but will do so only to avoid injustice." "Such an order should be granted or refused as justice may require in view of the circumstances of a particular case." *Norton v. City of Pomona* (1935) 5 Cal.2d 54, 62.

The delay of more than two years was clearly the fault of plaintiff. Plaintiff had it within her power at all times to cause a proper judgment to be entered, (*Hadley, supra* at page 396). Moreover, justice is not accomplished by predating a judgment to apply an incorrect, rather than a correct construction of the law.

Judgment was entered on May 12, 1982. Following the motion for new trial on July 22, the court set aside the judgment to reconsider the matter in view of *McCarty*. (Code of Civil Procedure Section 662.) While the court was considering the impact of *McCarty*, Congress passed a statute to become effective February 1, 1983. It will permit community property states to classify military pensions as community property from June 26, 1981 forward, the day following the *McCarty* decision.

Questions presented:

I. Does this court have the power to consider any order except that directed by the Court of Appeal?

II. If it does, what effect does *McCarty* have on the case?

III. What effect does the recent congressional legislation have on the case?

IV. Has defendant stipulated to a division of his pension?

I

The decision of the Court of Appeal is the law of the case which ordinarily conclusively determines the rights of the parties. However, where there has been a change in the law relied upon by the reviewing tribunal before subsequent proceedings in the trial court, the trial court should apply the changed law, although it conflicts with the decision on appeal. *Anton v. San Antonio Community Hospital* (1982) 132 Cal.App.3d 638, 649; *Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 147; *England v. Hospital of Good Samaritan* (1939) 14 Cal.2d 791, 795, 796; 6 Witkin, *California Procedure* (2d Edition 1971) Section 650-651.

On December 7, 1979, when this court announced its decision, the court had no discretion. Its function was mainly ministerial, to carry out the directive of the Court of Appeal. But judgment was not entered until May 12, 1982 and until judgment was entered, a writ of execution could not issue and the time was not ripe for post-trial motions. (Code of Civil Procedure Section 664.) In the meantime, the rule of law relied upon by the Court of Appeal had been rejected by the United States Supreme Court in *McCarty*. The United States Supreme Court held that the spouse has no interest or right in military retirement pay.* Therefore, it is the duty of this court on retrial to apply the *McCarty* decision if it otherwise controls this litigation.

II

The opinion of our Fourth District Court of Appeal in *In re Marriage of Sheldon* (1981) 124 Cal.App.3d 371 determined that *McCarty* should not be accorded full retroactivity. But the Court stated, *McCarty* may be applied where the military spouse requested the trial court to reserve jurisdiction on the question of the character of the property interest in the pension or the federal preemption issue was timely raised and briefed on appeal. Here, the question has been appropriately raised by the defendant on this motion. However, the circumstances are unusual. The issue presented, narrowly and precisely stated, is this:

---

* Compare the language of the Court of Appeal on page 8, "Rosamond was unaware (as was LaVerne) of *her rights* in the military pension . . ."

> Where the trial court announced it [*sic*] decision in conformance with an appellate court's mandate, directing the division of a military pension between former spouses but the basis for the order was annulled by the United States Supreme Court before entry of judgment, should the subsequent judgment confirming the announced decision be set aside to conform with the change in the law?

The answer may lie in the *Sheldon* opinion. At page 380, the court stated:

> "To permit and in fact encourage the relitigation of property interests long after the issues were supposedly settled would merely serve to reopen old wounds and create new ones. There is no guarantee that the nonservice member spouse would have assets sufficient to reimburse the service member for that portion of the pension rights which had previously been an awarded share of community property. Substantial hardship would result in cases where the nonmember relied on the property settlement in converting his or her share into nonliquid assets. Moreover, a reallocation of property interests would likely constitute sufficient 'changed circumstances' to trigger a second round of relitigation involving spousal support awards."

Here we have the obverse of this. To apply the same principle quoted from *Sheldon*: "[t]here is no guarantee that the . . . [service member] spouse would have assets sufficient to reimburse the . . . [non-service member] for . . . the pension rights which had previously been . . ." retained by the service member.

The Court of Appeal addressed the hardship problem to some extent in its previous decision in this case. The Court stated at page 6 "The defense cannot be maintained on the basis of a possible hardship arising from a collateral matter without connection with the claims involved." However, the court was then considering the matter from the perspective of a wife of 22 years who was deprived of her *rightful community* property. (See page 8, last sentence.) Now the shoe is on the other foot. The question is whether a wife who had no community property right should be allowed to disturb the status quo which was thought to be wrong in 1979 but in 1981 turned out to be correct. If *McCarty* is not applied to this case, then a serviceman who owed nothing to his former spouse must

now come up with $50,676.19, plus accumulated interest to conform with California's misinterpretation of federal law.

The *Sheldon* court stated:

> ". . . we limit our discussion in this case to cases in which an appeal was filed before the *McCarty* decision, and do not consider issues such as the resolution of post trial motions addressed to the trial court which may involve different equitable considerations. (See e.g., Code Civ. Proc. sections 662 and 663.)
>
> "We have no quarrel with applying *McCarty* to cases not final on appeal where the federal preemption issue was argued by the service member-spouse in the trial court . . ." (Page 381.)

Here, the federal preemption issue has been argued in the trial court. Hence we conclude the equitable considerations raised in the post-trial motion require application of *McCarty*.

III

The United States Supreme Court's interpretation of congressional legislation binds everyone, including Congress. Under *McCarty*, Mrs. Brown never had a community property right to Captain Brown's retirement. The present action for partition is based on the premise that she had such a right during coverture and remains a tenant in common with her former husband. (*DeGodey* and other cases cited *supra*, p. 1.)

> "A spouse with a community property interest in the other spouse's retirement pay 'claims not as a creditor, but as an owner with a "*present existing, and equal interest.*"'" *In re Marriage of Fithian* (1977) 74 Cal.App.3d 397, 403. (Emphasis supplied.)

The "Uniformed Services Former Spouses Protection Act of 1982" does not become effective until February 13, 1983 and it properly does not attempt to create any rights prior to June 25, 1981 (Section 1408(c)(1)). This statute therefore leaves untouched the rights Mrs. Brown had in 1970. Although decisional law may not apply retroactively so as to effect cases that hav been decided, a decision that interprets

language in a statute declares the meaning for the past as well as the present. Here we are not confronted with an attempt to disturb a prior adjudication to make it conform with a current judicial interpretation. Therefore the recent act of Congress has no effect on this case.

IV

Finally, plaintiff asserts that *McCarty* does not deprive her of community property rights in the retirement because defendant stipulated she had such rights. She relies upon *In re Marriage of Sheldon, supra* and *In re Marriage of Mahone* (1981) 123 Cal.App.3d 17. In *Sheldon*, the Court held that because the parties had stipulated that military retirement was community property *after* the Supreme Court had grated certiorari in *McCarty*, the right survived the *McCarty* decision. The timing of the stipulation was of significance to the *Sheldon* court. (See *Sheldon* at page 382.) Here there has never been a stipulation to this effect. The defendant stipulated to the amount of retirement benefits he had received for the purpose of calculation but never did he agree that plaintiff had an interest therein. The Court therefore concludes that judgment shall be entered for defendant.

Dated: DEC 10 1982

LOUIS H. WELSH

JUDGE OF THE SUPERIOR COURT

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Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

ROSAMOND F. BROWN,
Plaintiff,
vs.
LAVERNE WILLIAM BROWN, JR., etc. et al.
Defendants.

Case Number 367326
JUDGMENT

This matter came on regularly for trial on December 7, 1979, In Department Number 21 of the above-entitled Court before the Honorable LOUIS M. WELSH, Judge. Judgment was entered herein on May 13, 1982, at Judgment Book 1422, Page 51. Said Judgment was vacated and set aside pursuant to the Order filed herein on July 22, 1982, and the case was reopened for further proceedings. Thereafter, on November 22, 1982, further proceedings were conducted in Department Number 21 of the above-entitled Court before the Honorable LOUIS M. WELSH, Judge. Plaintiff, ROSAMOND F. BROWN, appeared in person and by and through her attorney, STEVEN E. BRIGGS. Defendant, LAVERNE WILLIAM BROWN, JR., appeared in person and by and through his attorneys, PORTER & HUFFMAN by JOHN W. PORTER, JR. After hearing oral argument by counsel for the respective parties, the Court took the matter under submission. The Court now having considered all of the evidence presented; having reviewed the pleadings submitted by the respective parties; having considered the oral argument of counsel for the respective parties; and having filed herein its Statement of Intended Decision on December 10, 1982,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff, ROSAMOND F. BROWN, shall take nothing by her complaint from Defendant, LAVERNE WILLIAM BROWN, JR.

2. Defendant, LAVERNE WILLIAM BROWN, JR. shall have and recover from Plaintiff, ROSAMOND F. BROWN, costs as shown on Defendant, LAVERNE WILLIAM BROWN, JR.'s, filed Memorandum of Costs.

Dated: DEC 15 1982

LOUIS M. WELSH
JUDGE OF THE SUPERIOR COURT

APPROVED AS TO FORM:

By: STEVEN B. BRIGGS, ESQ.
Attorneys for Plaintiff

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROSAMOND F. BROWN,

Plaintiff and Appellant,

v.

LAVERNE WILLIAM BROWN, JR., ET AL.,

Defendants and Respondents.

4 Civ. No. 28567

(Super. Ct. No. 367326)

APPEAL from a judgment of the Superior Court of San Diego County, Louis M. Welsh, Judge. Reversed.

Rosamond F. Brown (Rosamond) appeals the judgment finding the military pension retirement payable to her former husband Laverne was separate property under *McCarty v. McCarty* (1981) 453 U.S. 210. The procedural history of this case is noted below.[1] After she filed her appeal, a series of cases including this court's decision in *In re Marriage of Buikema* (1983) 139 Cal.App.3d 689, 691 prompted Rosamond to move for summary reversal. In accommodating her request we placed this case on calendar for oral argument.

---

[1]In 1975 Rosamond sought a division of military retirement benefits not disposed of in the earlier interlocutory judgment of dissolution of January 1970. She successfully appealed and in December 1979 the trial court awarded her 36.5% of her former husband's pension benefits. Following *McCarty* and noting that a formal judgment had not been prepared, Laverne moved to enter judgment. He then timely sought a new trial or to vacate and set aside the judgment on the basis of *McCarty*. The trial court denied the motion for new trial, vacated the judgment entered on may 13, 1982 and reopened the case for further proceedings ultiamtely finding *McCarty* applied. It is from this latter judgment Rosamond has appealed. With this unusual procedural background it can hardly be said that Laverne has relied upon *McCarty* to his detriment.

In addition to *Buikema*, we now have *In re Marriage of Sarles* (1983) 143 Cal.App.3d 24, *In re Marriage of Camp* (1983) 142 Cal.App.3d 217, *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 833 and *In re Marriage of Frederick* (1983) 141 Cal.App.3d 876 holding the *McCarty* issue is moot and the statute (the Uniformed Services Former Spouses' Protection Act) should be applied retroactively to the date of the issuance of *McCarty* to all cases not final on February 1, 1983.[2]

Judgment reversed.

WIENER, J.

WE CONCUR:

BROWN, P.J.

BUTLER, J.

[2]Both in written and oral argument Laverne's counsel vigorously urged us to consider the constitutional effect in applying the federal statute retroactively. Deference to the doctrine of stare decisis requires that we adhere to precedent. It is therefore unnecessary in this case to reach the constitutional issue.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROSAMOND F. BROWN,

Plaintiff and Appellant,

v.

LAVERNE WILLIAM BROWN, JR., ET AL.,

Defendants and Respondents.

ORDER MODIFYING OPINION

4 Civ. No. 28567

(Super. Ct. No. 367326)

The opinion filed on August 15, 1983 is modified in the following particular:

1. On page 2, after "Judgment reversed" add the following sentence:

> "The trial court is directed to enter judgment in favor of Rosamond F. Brown as set forth in its May 12, 1982 order."

Brown
BROWN, P.J.

cc: All parties

K-1

COURT OF APPEAL—STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

ROSAMOND F. BROWN,
Plaintiff and Appellant,

vs.

LAVERNE WILLIAM BROWN, JR., ET AL.,
Defendants and Respondents.

4 Civil No. 28567

Superior Court No. 367326

THE COURT:

The petition for rehearing is denied.

Brown
Presiding Justice

Copies to: San Diego County Clerk
Steven E. Briggs, Esq.-La Habra
John W. Porter, Esq.-San Diego

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

NOV 25 1968

I have this day filed Order

55;

HEARING DENIED

In re: 4 Civ. No. 28567

ROSAMOND F. BROWN

vs.

LAVERNE WILLIAM BROWN, JR., et al.

Respectfully,

Clerk

~/28

1982 FEDERAL UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

10 USD §1002 ff
TITLE X

PUBLIC LAW 97-252

TITLE X — FORMER SPOUSES PROTECTION

SHORT TITLE

Sec. 1001. This title may be cited as the "Uniformed Services Former Spouses' Protection Act."

PAYMENT OF RETIRED AND RETAINER PAY

Sec. 1002. (a) Chapter 71 of title 10, United States Code, is amended by adding at the end thereof the following new section:

"§1408. Payment of retired or retainer pay in compliance with court orders

"(a) In this section:

"(1) 'Court' means —

"(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

"(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

"(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

"(2) 'Court order' means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued degree), which —

"(A) is issued in accordance with the laws of the jurisdiction of that court;

"(B) provides for —

"(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)))";

"(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)))"; or

"(iii) division of property (including a division of community property); and

"(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

"(3) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(4) 'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which —

"(A) are owed by that member to the United States;

"(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

"(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

"(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i) if such member presents evidence of a tax obligation which supports such withholding;

"(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

"(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

"(5) 'Member' includes a former member.

"(6) 'Spouse or former spouse' means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

"(b) For the purposes of this section —

"(1) service of a court order is effective if —

"(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

"(B) the court order is regular on its face;

"(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

"(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (950 U.S.C. App. 501 et seq.) were observed; and

"(2) a court order is regular on its face if the order —

"(A) is issued by a court of competent jurisdiction;

"(B) is legal in form; and

"(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

"(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

"(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

"(3) This section does not authorize any court to order a member to apply for a retirement or retire at a particular time in order to effectuate any payment under this section.

"(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial

jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

"(d)(1) After effective service on the Secretary concerned of a court order with respect to the payment of a portion of the retired or retainer pay of a member to the spouse or a former spouse of the member, the Secretary shall, subject to the limitations of this section, make payments to the spouse or former spouse in the amount of the disposable retired or retainer pay of the member specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

"(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired or retainer pay of the member as property of the member or property of the member and his spouse.

"(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

"(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

"(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of disposable retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member, from the disposable retired or retainer pay of the member, any part of the amount payable to the spouse or former spouse under the division

of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

"(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

"(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of a member, such pay shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

"(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall —

"(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

"(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of —

"(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

"(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42

U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus —

"(I) the amount of disposable retired or retainer pay paid under clause (i) and

"(II) the amount of disposable retired or retainer pay retained under clause (ii).

"(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

"(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

"(B) Notwithstanding ay other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

"(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former

spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

"(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

"(f)(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribe pursuant to subsection (h).

"(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

"(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

"(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section".

"(b) The table of sections at the beginning of such chapter is amended by adding at the end thereof the following new item:

"1408. Payment of retired or retainer pay in compliance with court orders".

ANNUITIES UNDER THE SURVIVOR BENEFIT PLAN

Sec. 1003. (a) Section 1447 of title 10, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(6) 'Former spouse' means the surviving former husband or wife of a person who is eligible to participate in the Plan.

"(7) 'Court' has the meaning given tht term by section 1408(a(1) of this title.

"(8) 'Court order' means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved property settlement agreement incident to such previously issued decree).

"(9) 'Final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

"(10) 'Regular on its face,' when used in connection with a court order, means a court order that meets the conditions prescribed in section 1408(b)(2) of this title".

(b)(1) Section 1448(a) of such title is amended —

(A) in paragraph (3)(A) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse,"; and

(B) in paragraph (3)(B) by inserting "or elects to provide an annuity under subsection (b)(2) of this section," after "for his spouse".

(2) Section 1448(b) of such title is amended to read as follows:

(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person or to provide an annuity to a former spouse.

"(2) A person who is married or has a dependent child may elect to provide an annuity to a former spouse instead of providing an annuity to a spouse or dependent child if the election is made in order to carry out the terms of a written agreement entered into voluntarily with the former spouse (without regard to whether such agreement is included in or approved by a court order).

"(3) In the case of a person electing to provide an annuity under paragraph (1) or (2) of this subsection by virtue of eligibility under subsection (a)(1)(B), the election shall include a designation under subsection (e).

"(4) Any person who elects under paragraph (1) or (2) to provide an annuity to a former spouse shall, at the time of making such election, provide the Secretary concerned with a written statement, in a form to be prescribed by that Secretary, signed by such person and the former spouse setting forth whether the election is being made pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order".

(c) Section 1450(a)(4) of such title is amended —

(1) by inserting "formr spouse or other" before "natural person"; and

(2) by striking out "if there is no eligible beneficiary under clause (1) or clause (2)" and inserting in lieu thereof "unless the election to provide an annuity to the former spouse or other natural person has been changed as provided in subsection (f)".

(d) Section 1450(f) of such title is amended to read as follows:

"(f)(1) A person who elects to provide an annuity to a person designated by him under section 1448(b) of this title may, subject to paragraph (2) of this subsection, change that election and provide an annuity to his spouse or dependent child. The Secretary concerned shall notify the former spouse or other natural person previously designated under section 1448(b) of this title of any change of election under the first sentence of this paragraph. Any such change of election is subject to the same rules with respect to execution, revocation, and effectiveness as are set forth in section 1448(a)(5) of this title.

"(2) A person who, incident to a proceeding of divorce, dissolution, annulment, or legal separation, enteres into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election under paragraph (1) unless —

"(A) in a case in which such agreement has been incorporated in or ratified or approved by a court order the person —

"(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and

modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and

"(ii) certifies to the Secretary concerned that the court order is valid and in effect; or

"(B) in a case in which such agreement has not been incorporated or ratified or approved by a court order, the person —

"(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse's agreement to a change in the election under paragraph (1) and

"(ii) certifies to the Secretary concerned tht the statement is current and in effect.

"(3) Nothing in this chapter authorizes any court to order any person to elect under section 1448(b) of this title to provide an annuity to a former spouse unless such person has voluntarily agreed in writing to make such election".

MEDICAL BENEFITS

Sec. 1004. (a) Section 1072(2) of title 10, United States Code, is amended —

(1) by striking out "and" at the end of clause (D);

(2) by striking out the period at the end of clause (E) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new clause:

"(F) the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay, and (ii) does not have medical coverage under an employer-sponsored health plan."

(b) Section 1076(b) of such title is amended by inserting at the end thereof the following: "A dependent described in section 1072(2)(F) of this title may be provided medical and dental care pursuant to clause (2) without regard to subclause (B) of such clause".

(c) Section 1086(c) of such title is amended by inserting after clause (2) the following new clause:

"(3) A dependent covered by section 1072(2)(F) of this title".

COMMISSARY AND EXCHANGE PRIVILEGES

Sec. 1005. The Secretary of Defense shall prescribe such regulations as may be necessary to provide that an unremarried former spouse described in subparagraph (F)(i) of section 1072(2) of title 10, United States Code (as added by section 904), is entitled to commissary and post exchange privileges to the same extent and on the same basis as the surviving spouse of a retired member of the uniformed services.

EFFECTIVE DATES AND TRANSITION

Sec. 1006. (a) The amendments made by this title shall take effect on the first day of the first month which begins more than 120 days after the date of the enactment of this title.

(b) Subsection (d) of section 1408 of title 10, United States Code, as added by section 1002(a), shall apply only with respect to payments of retired or retainer pay for periods beginning on or after the effective date of this title, but without regard to the date of any court order. However, in the case of a court order that became final before June 26, 1981, payments under such subsection may only be made in accordance with such order as in effect on such date and without regard to any subsequent modifications.

(c) The amendments made by section 1003 of this title shall apply to persons who become eligible to participate in the Survivor Benefit Plan provided for in subchapter II of chapter 73 of title 10, United States Code, before, on, or after the effective date of such amendments.

(d) The amendments made by section 1004 of this title and the provisions of section 1005 of this title shall apply in the case of any former spouse of a member or former member of the uniformed services only if the final decree of divorce, dissolution, or annulment of the marriage of the former spouse and such member or former member is dated on or after the effective date of such amendments.

(e) For the purposes of this section —

(1) the term "court order" has the same meaning as provided in section 1408(a)(2) of title 10, United States Code (as added by section 1002 of this title);

(2) the term "former spouse" has the same meaning as provided in section 1408(a)(6) of such title (as added by section 1002 of this title); and

(3) the term "uniformed services" has the same meaning as provided in section 1408(a)(7) of such title (as added by section 1002 of this title).

No. 83-1390

In The

Supreme Court of the United States

October Term, 1983

LAVERNE WILLIAM BROWN, JR.,

Petitioner,

v.

ROSAMOND F. BROWN,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner's statement of question as presented is *inaccurate* so far as the present case is concerned. Contrary to Petitioner's statement of the case herein presented was not final prior to the effective date of The Uniformed Services Former Spouses Protection Act (February 1, 1983). It is clear by the Statement of Facts as presented by Petitioner, that the case now before the Court was in the state of continuous hearings and appeals throughout the granting of Respondent's Motion for Summary Reversal on August 15, 1983. Thus, any reference to cases final prior to the effective date of The Uniformed Services Former Spouses Protection Act are not determinative so far as the present case is concerned.

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JURISDICTION

The authorities listed in petitioner's Statement of Jurisdiction is not controverted herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Uniformed Services Former Spouses Protection Act Pub.L. 97-252; 10 U.S.C. Section 1006(a) (b), and 1408(c) (1).

STATEMENT OF FACTS

The statement of facts as presented by Petitioner in his Petition For Writ of Certiorari (Pages 4-7) is uncontroverted.

REASONS FOR NOT GRANTING PETITIONER'S WRIT OF CERTIORARI

In May 1975, the date Respondent commenced her action for partition, California law provided that Respondent (hereinafter Mrs. Brown) had a community property interest in Petitioner's (hereinafter Captain Brown) retirement benefits at the time of the original trial of the dissolution action in 1970, and as a result of the trial court's failure to divide those benefits she remained a tenant in common with Captain Brown as to those rights, *In re Marriage of Fithian* (1974) 10 Cal.3d 592.

Respondent prevailed in the action for partition and thereafter this court issued its decision in *McCarty vs. McCarty* (1981) 543 U.S. 210, 69 L.Ed.2d 589, 101 S.Ct. 2728, and Congress enacted the Federal Uniformed Services Former Spouses Protection Act (hereinafter USFSPA), 10 U.S.C. Section 1006 and Section 1408, Public Law 97-252.

Captain Brown argues that in accordance with the McCarty decision, California law up to the effective date

of USFSPA, should have characterized military pension rights as the separate property of the servicemen. Accordingly, Captain Brown argues that any characterization of military benefits as community property could not constitutionally be allowed until February 1, 1983, the effective date of USFSPA.

Initially, it must be noted that this case deals with a situation where respondent became owner of a proportionate interest in Captain Brown's retirement benefits by operation of the California law, at the point in time at which the trial court in the dissolution action, failed to make a division of the benefit.

> "Under California law, a spouse's entitlement to a share of the community property arises at the time that the property is acquired. (Civ. Code §§ 5107, 5108, 5110.) That interest is not altered except by judicial decree or an agreement between the parties. Thence 'under settled principles of California community property law, "property which is not mentioned in the pleadings as community property is left unadjudicated by decree of divorce, and is subject to future litigation, the parties being tenants in common meanwhile."' *Henn v. Henn*, 26 Cal.3d 323; 161 Cal.Rptr. 502, 605 P.2d 10."

The substance of the pending action was to partition those property rights created several years earlier by operation of law. This case *does not* involve the process of the court declaring retirement benefits to be community property in a dissolution action.

Captain Brown contends the California courts are bound by *McCarty*, supra in spite of the long line of cases in California Courts of Appeal which have ruled that *McCarty* is not applicable as a result of USFSPA, *In re Marriage of Buikema* (1983) 139 Cal.App.3d 639, *In re Marriage of Frederick* (1983) 141 Cal.App.3d 867, *In re*

Marriage of Camp (1983) 142 Cal.App.3d 217, *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, *In re Marriage of Ankenman* (1983) 142 Cal.App.3d 350, *In re Marriage of Sarles* (1983) 143 Cal.App.3d 24.

Respondent has suggested throughout that in view of this merely being an action to partition existing rights, *McCarty,* supra, was never applicable at all.

The present status of California law regarding the characterization of military pensions was clearly set forth in the Appellate Court decision and *In re Marriage of Sarles,* supra.

> "It is clear that Congress has now provided power to each State through USFSPA to deal with military pensions in the manner in which it had previously treated them or chooses to treat them in the future. Under USFSPA, neither Federal premption nor supremacy of the Federal Government as to military and defense matters are considerations. Because California has regularly applied a community property division to military pensions pre-*McCarty,* and because that power has now been returned to the States by USFSPA, there does not appear to be any proper reason in the present proceeding to act to the contrary."

In re Marriage of Sarles (1983) 143 Cal.App.3d, 30.

The case now before the Court was not final as of the date of the *McCarty* decision (June 1, 1983). The issue is whether or not California is free, in such a case, to apply USFSPA as Congress intended. It is crucial that contrary to the statement of the question presented by petitioner, we are presented here with a case in which the decision was not final. Captain Brown argues that according to *McCarty,* supra, the property characterization of military pensions up to the enactment of USFSPA, Febru-

ary 1, 1983, is to award the military pension benefit to the military service member as his sole and separate property thus he would argue that in 1970 when the dissolution action was before the Court Mrs. Brown had no interest in Captain Brown's military pension and thus has no interest today.

To allow such interpretation, that is to deny the retroactive application of USFSPA, would be to allow the *McCarty* decision to provide a major disruption to the characterization of military pension benefits as applied consistently by California Courts.

If USFSPA is not considered applicable to post-*McCarty* decisions, substantial rights of California litigants would be determined by the vagarities of the calendar or the failure of the litigant to appeal his case.

CONCLUSION

Since the beginning of the present action, the State of Law in California regarding the characterization of military pension benefits has remained constant, not withstanding the momentary effect of *McCarty*, as a result of decisions before *McCarty* and after USFSPA. At the time of filing the action for a partition on May 27, 1975, military pension benefits were clearly community property in accordance with *In re Marriage of Fithian*, supra. During pendency of the present action the McCarty decision of June 1, 1971 held that military pension benefits were the separate property of the service member. The enactment of The Federal Uniformed Services Former Spouses Protection Act clearly expresses Congress' intent that the characterization of military benefits be determined in accordance with State Law.

To disallow California's application of USFSPA and to permit Captain Brown to select the law of a particular period of time which better suits his position, would be to deny Respondent substantial rights afforded California litigants generally and would otherwise throw the State of Law with regard to the characterization of military pension benefits into a state of confusion.

Respondent contends that a constitutional analysis of the propriety of retroactive application of USFSPA is unnecessary. However, any constitutional analysis, if made, must be conducted in light of the State interest served by California's application of USFSPA. The California Supreme Court addressed this issue in its opinion in *In re Marriage of Bouquet* 16 Cal.3d 583.

> "In determining whether a retroactive law contrevenes the due process clause, we consider such factors as the significance of the State interest served by the law, the importance of their retroactive application of the law of the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which the retroactive application of the new law would disrupt those actions."

Other than the twenty months between *McCarty* and the enactment of USFSPA, California law has held that military pension benefits are to be considered as community property. To allow the brief history of the *McCarty* decision to interrupt the history of such characterization of military pension benefits would serve no state interest and in fact would contravene the substantial rights of California litigants whose cases happen to fall within this twenty months of the calendar. In view of the fact that the decision in this case was not final on the ef-

fective date of USFSPA, California Courts are clearly free to apply USFSPA as Congress intended and no constitutional issue or important federal questions are presented.

For these reasons this Court should deny the Petition for Writ of Certiorari here and applied for.

Dated: March 19, 1984

Respectfully submitted,

LAW OFFICES OF STEVEN E. BRIGGS

By: Steven E. Briggs

Attorney for Respondent